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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

DOCKET NO. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,
Defendants-Appellants,

v.

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES, and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,
Plaintiffs-Appellees.

BRIEF FOR APPELLEES

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Defendants-Appellants,

v.

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES, and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated.

Plaintiffs-Appellees.

BRIEF FOR APPELLEES

The defendants below, George K. Wyman, as Commissioner of the New York State Department of Social Services and the New York State Department of Social Services, take this appeal from two interlocutory orders of a statutory three-judge Court convened in the United States District Court for the Southern District of New York, (Hays, C.J., Mansfield, D.J., and Motley, D.J.). At issue is the disparity between public assistance standards of need for New York City residents and those for residents of seven surrounding counties. The first order dated September 12, 1969 granted preliminary relief to the original class plaintiffs, recipients of Aid to the Aged, Aid to the Blind and Aid to the Disabled (hereinafter "AABD" or "adult categories") and enjoined, preliminarily, the appellants from promulgating

schedules of grants thereunder "other than according to objective non-discriminatory standards based on the costs of needs of such recipients". The second order permitted the intervention of Nassau County recipients of Aid to Dependent Children (hereinafter "AFDC" or "children's category") and extended the same preliminary relief to that class of recipients.

Trial was originally scheduled for October 6, 1969, but was ordered held in abeyance on consent of all parties, pending the Court's determination in this appeal.

OPINIONS BELOW

The opinion of the District Court Judge convening the statutory three-judge Court is unreported but is set forth in the appendix at pages 35-36.

The unanimous opinion of the statutory three-judge Court granting preliminary relief to the original AABD plaintiffs is reported at 303 F.Supp. 339 (SDNY 1969) and appears in the appendix at pages 101-124. The application for intervention and preliminary relief by the AFDC recipients, being made after the decision was rendered as to the AABD recipients, was granted by the three-judge panel without written opinion.

JURISDICTION

The decision of the three-judge District Court granting the appellees' motion for preliminary relief and denying the appellants' motion for summary judgment was entered on August 4, 1969. The first order granting preliminary relief to the AABD recipients was issued on September 12, 1969 and the Notice of Appeal therefrom was served and filed on October 10, 1969. The second order which granted the application of appellees Jones and Harvanek, on behalf of AFDC plaintiffs for leave to intervene and for preliminary relief, was issued on October 22, 1969 and the Notice of Appeal therefrom was served and filed on October 24, 1969.

The appellants' jurisdictional statement was filed on November 29, 1969 and probable jurisdiction was noted on February 24, 1970.

The jurisdiction of this Court is conferred by 28 USC § 1253 which provides for direct appeals to the United States Supreme Court from the decisions of statutory three-judge District Courts granting or denying preliminary relief.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED.

I. The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "No state shall * * * deny to any person within its jurisdiction the equal protection of its laws."

II. 42 USC § 302(a)(1), § 602(a)(1), § 1202(a)(1), § 1352 (a)(1), and § 1382(a)(1) contain an identical provision for each of the federally reimbursed categories of assistance, which are, respectively, Old Age Assistance, Aid to Dependent Children, Aid to the Blind, Aid to Permanently and Totally Disabled, and a combined program of Aid to the Aged, Blind or Disabled and Medical Assistance to the Aged. The provision is as follows:

> "A state plan . . . must . . . provide that it shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them."

III. Regulations and requirements promulgated by the United States Department of Health, Education and Welfare at issue in this case are:

1. *Handbook of Public Assistance Administration*, United States Department of Health, Education and Welfare, Part II, § 4300 provides, in pertinent part:

> "The purpose of the requirements relating to statewide operation is to assure that the public assistance program in which there is federal financial participa-

tion will be in effect throughout the state; that local offices will be available where persons can apply for assistance and services; that the benefits of the programs will be equally available to all eligible persons; and that state policies, standards and methods will apply equally to persons in like situations wherever they may live.

"Where the program is administered by political subdivisions under state supervision, the state agency is responsible for assuring that the state program and state rules and regulations are in effect in all political subdivisions. This means that the specific eligibility factors for each assistance program, including resources and standards of need, and any additional eligibility factors included in the approved state plan are uniformly applied in areas, offices or political subdivisions."

2. 45 CFR § 233.20(a) provides in pertinent part:

(A State Public Assistance Plan Shall)

"1. General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equaitable basis . . ."

"2. Standards of Assistance.
(i) Specify a statewide standard expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment."

* * *

"(iii) Provide that the standard will be uniformly applied throughout the State."

IV. New York Social Services Law § 131-a[1] in pertinent part provides:

"1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall

[1]Section 131-a was enacted on March 31, 1969 to take effect on July 1, 1969 by L. 1969, ch. 184. Subdivision 4 was added to §131-a by L. 1969, ch. 411, enacted May 2, 1969, effective July 1, 1969.

provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

"2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

"3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$225	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

"4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services

district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

McKinney's Session Laws 1969, Ch. 184[2] provides:

"Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.

The present procedure for establishing the monthly grant and allowance, based upon various factors, has been criticized as arbitrary, confusing, complicated and time-consuming for social services personnel and allegedly resulting in a lack of uniformity and uneven treatment of the recipients of public assistance throughout the state.

A uniform schedule of monthly grants and allowances will promote greater uniformity and equality of treatment of the recipients of public assistance, meet the needs of our less fortunate citizens and simplify and reduce the administrative detail. This

[2]Preamble to Social Services Law §131-a

will release case workers for the more important task of providing casework services to restore recipients to the dignity of self-sufficiency.

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter."

V. 18 NYCRR § 352.4(a)(2), dated 6/30/69, provides in pertinent part as follows:

"2. The monthly grants and allowances shall be as follows:

SCHEDULE SA-1

MONTHLY GRANTS AND ALLOWANCES

NEW YORK CITY

Number of Persons							Each Additional
One	Two	Three	Four	Five	Six	Seven	Person
$70	$110	$162	$208	$254	$297	$340	$43

SCHEDULE SA-2

MONTHLY GRANTS AND ALLOWANCES

COUNTIES OF Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester

Number of Persons							Each Additional
One	Two	Three	Four	Five	Six	Seven	Person
$63	$107	$149	$191	$233	$270	$307	$37

QUESTIONS PRESENTED

1. The public assistance standard of need applied to appellees, residents of New York City suburban counties, together with that applied to New York City recipients, was reduced below what the state had previously considered to be a minimally adequate level for survival; the standard of need applied to appellees was then further reduced from 7 to 16 per cent below the New York City standard, despite the uncontested fact that the cost of items essential for survival, such as food, is equally as great for appellees as for New York City recipients. Welfare officials from appellees' home counties gave uncontradicted testimony that the reduced standard of need for appellees leaves them with welfare allowances that are lower than the amount needed to obtain the bare essentials of life. In these circumstances, did the district court abuse its discretion in finding the plaintiffs-appellees would suffer irreparable harm unless the preliminary injunctions here appealed were issued?

2. Is there strong reason to believe that plaintiffs-appellees will succeed in their contention that the differentials in standard of need established under § 131-a violate the uniformity requirements of the Federal Social Security Act?

3. Should the statutory issues in this case be determined before reaching the constitutional issues?

4. Did the court below abuse its discretion in finding strong reason to believe that traditional standards of equal protection are violated by the establishment of a public assistance standard of need for New York City recipients that is significantly higher than that applied to residents of suburban counties, in light of the facts that there is no difference whatsoever in the two areas in the cost of the items of need included in the standard (with the exception of certain items the cost of which is higher in the surrounding counties), that there is no rational basis whatsoever for concluding that New York City recipients have higher "social

aspirations" than do those in surrounding counties, and that the standard of need applicable to those in surrounding counties is insufficient to obtain items needed for survival?

5. Is this case unripe for federal judicial determination?

The court below answered "no" to question 1, declined to determine question 2, answered "no" to question 3, answered "no" to question 4, and answered "no" to question 5 except for the statutory issue, to which it answered "yes."

STATEMENT OF THE CASE

The appellees are five recipients of public assistance, residing in Westchester and Nassau Counties, two suburban counties contiguous with New York City in the State of New York. They receive assistance in New York's federally supported public assistance programs Aid to the Aged, Blind and Disabled and Aid to Dependent Children.[3] As class representatives of persons receiving such categories of assistance, appellees brought this action challenging § 131-a of the Social Services Law and the statewide administrative regulation[4] promulgated by the appellant Wyman which created a wholly arbitrary and unjustifiable difference in

[3] The federal legislation regarding these categories of assistance appears in 42 USC §301 *et seq.* (Old Age Assistance) §601 *et seq.* (Aid to Families with Dependent Children) §1201 *et seq.* (Aid to the Blind) and §1351 *et seq.* (Aid to Totally Disabled and §1382 (Combined Program for Adult Categories). New York has a combined program pursuant to §1382 for the adult categories. New York Social Services Law §350 *et seq.* The Federal regulations specifying guidelines to be followed in the state and local programs which are federally reimbursed are found in 45 CFR §233.20, 34 Fed. Reg. 1394, and Handbook of Public Assistance, Pt. II §4000 *et seq.*

Public Assistance in New York State is administered according to the provisions of the Social Services Law and Title 18 of the New York Code Rules and Regulations.

[4] Ch. 184 L. 1969 (March 31, 1969); 411 L. 1969 (May 2, 1969); 18 NYCRR §352.4 (June 30, 1969).

the level of grants which appellees receive as compared to that which identical families in New York City receive.[5] The action was instituted pursuant to 42 USC 1983 and 1988, 28 USC § 1331, 1337, 1343, 2201 and 2202. The appellees alleged that the schedule for the lowered grants violated the Social Security Act's requirements of statewide uniformity in public assistance grants as contained in 42 USC § 602(a)(1), § 1382(a)(1), and in the regulations promulgated thereunder 45 CFR § 233.20(a)(1)(2), Department Health, Education and Welfare Handbook of Public Assistance Administration Part II, § 4300. The discriminatory schedule was also attacked as violative of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

A. *The Enactment of § 131-a and the Promulgation by Appellant Wyman of a Schedule of Public Assistance Grants Which Provide One Level of Benefits to Recipients in New York City and a Lower Level to Recipients in Suburban Counties in the New York Metropolitan Area*

Prior to October 1, 1968, grants for public assistance recipients in New York State were divided into three parts a grant to cover the cost of rent, a grant to cover the cost of certain recurrent needs that all families share, and special grants to cover the costs of special needs individual families may have. *Rosado v Wyman* U.S. , (1970) 38 USLW 4266. The grant for recurrent needs included money for the following items: Food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry and sales taxes. Deposition of Appellant Wyman, Appendix, p. 47. (Hereafter Appendix page numbers are cited "(A.)"). It did not include money for rent which was granted on the basis of the individual

[5] It should be noted "New York City recipients" are not merely those living in the Borough of Manhattan, but include recipients residing in outlying areas such as Queens, Staten Island, Brooklyn, and Bronx.

family's actual rent, nor money for transportation costs which either were not paid for or were covered in the grant based on the individual family's special needs nor money for cultural and recreational events which was not granted at all. Id. (A. 61)

The grant level for basic recurring needs was established by pricing the individual items the grant is intended to cover. The last time such a pricing was conducted was in May 1968. Id. (A. 50, 55). At that time and on the basis of the pricing study the state welfare agency determined to continue the division of New York State into three areas labelled SA-1, SA-2 and SA-3. New York City, Nassau, Westchester and five other suburban counties were placed together in the SA-1 category and needy families in these areas received identical basic monthly grants regardless of whether they lived in Westchester, Nassau or New York City. This was consistent with the practice of the State ever since the outset of statewide administration of welfare grant levels in New York State.[6]

In Setting these grant levels the sole difference between the various areas of the state was differing utility cost, which was the same in Nassau, Westchester and New York City (A. 59). All other items were found to cost approximately the same throughout the State and hence recipients in areas where utility costs were the same were treated identically. This is made clear in reading the deposition of the appellant Wyman in which he explains the differences in grant levels as follows:

> Q. And were those differences based on a desire to give some people more money than other people?
> A. On the basis of the cost of living in those areas.

[6] Prior to 1951, county welfare administration set the level of recipient grants. This procedure was the source of some dispute between H.E.W. and New York because of the resulting lack of uniformity within the state. See Altmeyer, *The Formative Years of the Social Security Act*, 192 (1966).

a variation due to the utilities cost between these geographic sections of the state.

Q. The differences between them were entirely due to utilities costs? A. Yes.

[4] Q. What is embraced by utilities? A. Electricity, water, gas, if that is provided, for cooking purposes, things normally considered utilities.

Q. And hence they reflected an object of giving people the exact same amount of purchasing power? A. The content would be the same, yes. (A. 41-42)

Later in his deposition, appellant Wyman testified that the cost difference for example of food between New York City and the most rural upstate county "is significant in the overall." (A. 82)

In addition to Commissioner Wyman's testimony, evidence on the comparable cost of items between Nassau and New York City is contained in the affidavit submitted to the District Court by Joseph S. Barbaro, Commissioner of the Nassau County Department of Social Services (A. 168) and the exhibit he annexed to his affidavit showing the cost of special need items in New York City and Nassau. (A. 175)

Commissioner Barbaro states:

"Based upon professional and personal experience, your deponent verily believes that the cost of maintaining minimally adequate standards of living in Nassau County is at least as high as those in New York City, and certain costs, such as transportation, are even higher in Nassau County. The New York State Board of Social Welfare has for many years treated New York City and Nassau County the same in its schedule of grants, SA-1.

"Attached thereto are various proofs, prepared with the County Attorney of Nassau County and the Planning Commission of Nassau County which were previously submitted to this Court in a related case which fully documents the lack of foundation for

the findings that the cost of living in Nassau County is lower than that in New York City.

"That the differential in standards of assistance as contained in § 131-a appears to me to be based on something other than a consideration of need." (A. 169)

Moreover, the United States Bureau of Labor Statistics in preparing its statistics on the cost of living includes for the area of New York City the surrounding counties. Id. (A. 82). In other words, the evidence below, fairly conclusively demonstrates that there is no difference in the cost of basic need items within the Greater New York Metropolitan area. The sole difference, which the court below noted (303 F.Supp. at 344, footnote 4) (A. 122) is that household furnishings appear to be more expensive in the suburban areas.

On October 1, 1968, New York State instituted a demonstration project in New York City to test the principle of the so-called flat grant. This demonstration project did not affect the grant for either rent or recurrent basic needs. However, it did replace the special grants in New York City with a $25.00 per person quarterly cyclical grant. The $25.00 representing an averaging of the costs of the special needs previously met on an individual basis.[7] *Rosado v. Wyman, supra*, 38 U.S.L.W. 4272.

[7] The reason for testing this averaging system in New York City was explained by George W. Chesbro, First Deputy Commissioner of Social Services of the State of New York in an affidavit submitted in *Rosado v. Wyman*, supra. Chesbro stated that the special grant "received by New York City welfare recipients more than double the average received in rural counties in many categories of public assistance." He explained, "This results from the wide variety of practices of local districts regarding special grants, the greater availability of information in New York City, greater accessibility of welfare offices, the recipients' attitude toward welfare and their degree of organization, their resultant sophistication and willingness to take advantage of opportunities within the system." *Rosado v. Wyman*, supra. (Appendix p. 98.)

Thus, on July 1, 1969, the effective date of § 131-a, the situation was that throughout the state public assistance recipients received grants for their rent, and for their recurrent basic needs.

The cost of meeting these basic needs was identical throughout the state except for utilities which were found to be the same in New York City, Nassau, Westchester and five other suburban counties. Finally, itemized special needs were met throughout the state except in New York City where instead, on a test basis, a cyclical payment representing the cost of the average special needs was made.

On March 31, 1969, the New York State Legislature enacted § 131-a of the Social Services Law. Among other things this law stripped the Commissioner of Social Services of his power to set grant levels, established new grant levels for recurrent basic needs, and abolished special grants.[8] Very shortly after the enactment of § 131-a, *Rosado v. Wyman*, supra, was brought challenging the validity of the statutes under 402(a)(23) and also attacking on statutory and equal protection grounds the lesser payments for AFDC recipients in Nassau County than those allowed in New York City. *Rosado v. Wyman*, 38 USLW 4266. This apparently led the Legislature to amend § 131-a to give the defendant Commissioner of Social Services the power to "promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established," but not to exceed the level provided for recipients in New York City "if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule." Consequently, the three-judge court remanded the "matter" to the original single district judge "until there [had] been an oppor-

[8] In *Rosado v. Wyman*, ___ U.S. ___ (1970), 38 U.S.L.W. 4266, 4271, the United States Supreme Court upheld the District Court's finding that "special grants were not included in these computations" referring to the new grant levels.

tunity for action by state officials." 304 F.Supp. 1354, 1356.

Appellant Wyman, without holding a hearing, without conducting a study and having before him only the same pricing studies which he used to classify New York City, Westchester and Nassau together in 1968, promulgated a schedule providing different levels of benefits to recipients in Westchester and Nassau from that received by identical recipients in New York City. The schedule promulgated by Wyman provided grants at the following levels:

Number of Persons in Household	*New York City*	*Nassau, Westchester and Five Other Suburban Counties*	*Percent Disparity*
ONE	$ 70	$ 65	7.7
TWO	116	107	8.4
THREE	162	149	8.7
FOUR	208	191	8.8
FIVE	254	233	9.0
SIX	297	270	10.0
SEVEN	340	307	10.7
Each Additional Person	43	37	16.2

At his deposition, appellant Wyman was asked what it was that accounted for the differences of 10% in the basic recurrent grant between New York City families and suburban families. He replied:

> "The essential difference is in the complexities of urban living in the City of New York, the necessity of provision of transportation items on a regular basis, the fact that there are social opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements." (A. 59)

These items which appellant Wyman testified accounted for the increased grant in New York City are items that were never included within the components of the basic recurring grant. That grant included only items of basic necessity, the items listed on page 9, supra. These items were not even included in the list of special grants. (A. 60) In other words, the list of the components contained within the recurring grant for basic needs was arbitrarily and suddenly expended only for New York City but not for the rest of the metropolitan area and not for any other cities or place within the state.

Wyman testified that the Legislature did not inform him in any manner that it was adding these items into the New York City budget. (A. 60) He testified he made no study of the relative availability and usage of museums, clinics, community centers, religious centers, cultural institutions in New York City, in Westchester County, in Nassau County and so on. (A. 63) No budgetary studies were made to determine the cost of these items. (A. 60) Defendant Wyman testified that he was unaware of the usage of these facilities by the city's poor. (A. 81) He testified no study was made of the different life styles in the city as compared to outside the city. (A. 81) He testified that transportation costs were less expensive in New York City. (A. 76). He further testified that he was unaware to the extent cultural facilities existed in Nassau and Westchester counties, but that to the extent they existed he assumed people would use them "as in New York City." (A. 66) He testified that he assumed that there were beaches and parks in Nassau and Westchester and that people used them and in addition that it cost more to do so. (A. 66) Finally he was asked if he took "into account the need for . . . visiting cultural facilities in these [suburban] communities" and he answered; "No, not to the same extent." (A. 76) Nonetheless, he promulgated the schedule of benefits above giving lower payments to appellees than to identically situated persons in New York City.

Further, appellant Wyman testified that the Department never told New York City recipients the purpose of this bonus they receive. (A. 63) Moreover, he testified it would not be a misuse of the money to use it to buy those items previously supplied by special grants. (A. 61, 63) In other words, New York City recipients can use this extra amount to make up for part of the special grants they lost, but other recipients outside the city who also lost those same special grants will not be able to do so.

B. *Plaintiff-Appellees*

Individually, the appellees are disadvantaged and handicapped persons living marginally on public assistance grants in suburban counties in the New York metropolitan area.

Appellee Rothstein is over 65 years of age. Prior to the new law she received special grants for medical out-patient hospital care with special needs grants to meet old-age expenses, a telephone for emergencies, transportation for shopping and hospital trips and extra size clothing. (A. 28) The new legislation eliminated assistance for these special needs and reduced her monthly grant from $85.90 to $65.00, $5.00 below that for a New York City recipient.

Appellee Batson is 68 years old and is totally blind. She has additional expenses related to a medically prescribed diet, a telephone for emergencies, food for her seeing-eye dog, and aid in reading. (A. 31) Mrs. Batson lost all special allowances for these needs due to the enactment of § 131-a, and despite a slight increase in her rent, her total grant was reduced by almost $100.00. (A. 99)

Appellee Miller is crippled and confined to a wheelchair, requiring the services of a homemaker, the aid of a telephone, transportation, and a medically prescribed diet. (A. 29) Her allowance was cut drastically from $122 to $65, 7.7% below a similarly situated recipient in New York City.

The remaining two appellees, Dolores Harvanek and Catherine Jones, intervened on behalf of themselves and

other recipients in the Aid to Dependent Children program. Mrs. Jones, a mother of three adolescent boys, previously received a grant of $239.75, including allowances for school lunches and a telephone, plus special periodic grants for furniture and clothing. Her grant was reduced by $38 to $191 per month, which is $17 (9%) below the amount accorded to a family of four in New York City. (A. 139) Mrs. Harvanek has six children, ages 17 to 8, and after the effective date of the law, her grant was reduced by $69 per month, plus the loss of all special clothing and furniture allowances, to a level of $43 (11%) less than a similarly situated family in New York City. (A. 40)

To each of the appellees and members of their classes, who received a bare 90¢ per day per person for food, the discriminatory differential represented certain basic needed items such as a seeing-eye dog, food, and minimal clothing.

C. *Three Judge Court Unanimous Opinion*

The lower Court issued a unanimous twenty-eight page opinion written by Judge Mansfield finding that no rational basis had been shown for the lower grants made to suburban recipients and, accordingly, that the appellees had demonstrated a likelihood of success on their claim that the discriminatory schedule violated the Equal Protection clause of the Fourteenth Amendment. The Court also considered the appellees' federal statutory claim that the lower allowances violated the Social Security Act's requirements for statewide uniformity of grants, but noted that since H.E.W. seemed to be reviewing New York's compliance on this issue with federal law, the Court would "defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W." 303 F.Supp. 351 (A. 119).[9]

[9]While H.E.W. has taken no action to date by way of a conformity hearing, it has informed Commissioner Wyman, through a letter dated November 10, 1969, that New York has failed to justify the lower allowances to suburban recipients and that therefore H.E.W. was "un-

The Court's decision was a comprehensive analysis of developments and factors in the public assistance field in New York during 1969 which resulted in the undeniably lower grants for suburban counties. The opinion noted initially that considerable evidence existed that the cost of meeting recipients' needs in New York City was the same as that in surrounding counties, as indicated by prior schedules making the same grant to both areas, the most recent (1968) cost study by Wyman upon which prior equal schedules were based, the 1968 survey of costs by the Department of Labor's Bureau of Labor Statistics which grouped New York City and surrounding counties in the same classification. 303 F Supp 342, 343 (A 103). Moreover, the Court weighed affidavits submitted by the Commissioners of the Nassau County Department of Social Services and the Director of the Nassau County Planning Commission stating flatly that costs of living and costs of transportation are as high or higher in Nassau County as they are in New York City, as well as the extensive price lists prepared by local welfare agencies demonstrating comparable or higher costs of clothing and furniture in suburban counties. 303 F Supp 344, fn 4, 34, fn 5, 348, fn 9 (A 122-124).

The Court emphasized that the legislature itself, while expressing concern for equal treatment in its preamble to § 131-a, did just the opposite in its schedules for suburban recipients. The Court, while noting the undisputed fact that no cost studies had been undertaken which indicated a higher cost of living in New York City, nonetheless meticulously examined each reason given by the appellant for the favored class of New York City recipients, including the "social cost of living in the urban center", "higher level of aspiration and expectations" and greater needs for transportation to beaches and recreational facilities. The Court

able to find that there is in effect a statewide standard being uniformly applied throughout the State." (A 172). No further action has been taken by either HEW or the State Commissioner.

noted that the appellant Commissioner admitted that no study existed to support his assumption of, for example, greater availability of cultural, medical and religious centers in New York City [redacted] 344 (A 107). Moreover, noted the Court, the Legislature had before it no evidence whatever [redacted] higher cost of living. The Court concluded:

> "There is not a scintilla of evidence that the difference between the level of the schedules prescribed by the Legislature for New York City and for its surrounding counties, respectively, could be justified on the basis of a difference in cost of the essential items forming the base of those levels. Indeed, the evidence before us is clear and undisputed that the cost of those essential items was the same for New York City as for the seven surrounding counties. In the face of such convincing and uncontroverted evidence, we cannot, therefore, assume that the Legislature founded the statutory disparity upon a geographical variation in cost of the component items." 303 F. Supp. 347 (A 113).

The Court found that the record disclosed no rational for the discrimination against the appellees except for that of saving funds, specifically found to be an impermissible basis for invidious discrimination in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Logically proceeding, the Court evaluated the impact of the discriminatory allowances upon the appellees:

> While this may seem minor to most people, it is of crucial importance to the appellees here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g. telephone service for medicine and groceries, food for seeing dogs, transportation allowances to hospitals, special diets for diabetics, readers for the blind, hearing makers for those confined to wheelchairs, etc.) [redacted] for an indigent person now receiving approximately fifty per day, for food an additional [redacted] per day

hardly be described as *de minimus*. Access to such bare necessities of life on a non-discriminatory basis involves a critical interest for those whose life depends on it." 303 F. Supp. 348 (A. 114).

Finally, noting that the evidence submitted indicated a likelihood of success on the plaintiffs' equal protection claim due to the appellant Wyman's failure to justify in any way the differential, the Court found that there was a threat of imminent harm to the appellees by way of losing food emergency needs and disability aids due to the significantly lower allowances, and granted a preliminary injunction.

II. *Relief Requested and Subsequent Events*

After this, Judge Court issued an order dated September 12, 1969 preliminarily enjoining the defendants from enforcing § 131-a [illegible] or from promulgating schedules of grants and allowances of public assistance or making payment thereof to such recipients other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients. (A. 126). In compliance with this order, on September 25, 1969 appellant Wyman ordered that the lowest assistance paid to AABD recipients in any [illegible] counties be raised to the New York City level, effective immediately. The aged, blind and disabled recipients in these counties were personally notified of the increased grants and since October 1969 have received public assistance on a par with New York City recipients.

[illegible] the district court set October 6, 1969 as the trial date. However, appellants notified appellees and the court before that they would prefer to appeal the preliminary injunction. The appellants and appellees agreed to advance the trial until after determination of this appeal.

The District Court [illegible] and therefore moved to [illegible] on behalf of themselves and all other recipients

On October 10, 1969, notice of appeal to this Court was filed.

Appellants subsequently moved by order to show cause before the lower Court for a stay of the two Court orders. After hearing oral argument on the application, the three judge panel unanimously denied the stay. On November 5, 1969, appellant Wyman ordered all suburban county welfare departments to provide AFDC and Home Relief recipients[11] who were not represented in the action with assistance grants equal to the allowances received by counterpart recipients in New York City.

On November 28, 1969, appellants filed their jurisdictional statement with an application for a stay of the two preliminary injunctions. By decision dated December 10, 1969, Mr. Justice Harlan denied the application for a stay of the District Court orders. Appellees on December 31, 1969, submitted to this Court a motion to affirm the decision of the three judge district court and for leave to proceed *in forma pauperis*.

On February 24, 1970, this Court noted probable jurisdiction, granted appellees' motion to proceed *in forma pauperis* and informally directed that there be an accelerated appeal with argument to be held during April 1970.

of Aid to Dependent Children residing in suburban counties also moving that the preliminary injunctive relief be extended to them and their classes (A 13), except (On October 10, 1969, after hearing arguments of both sides and considering the motion papers submitted including an affidavit in support of the intervening children by the Nassau County Commissioner of Social Services (A 211), the court unanimously granted leave to intervene to the AFDC recipients and extended to them the preliminary relief granted previously to the AABD recipients. On October 22, 1969, the Court signed an order embodying its oral decision of October 10, 1969 directing that the same ... [illegible] ... relief be applied to them as well.

[11] The only general category in New York State which is not [illegible] relief reimbursed.

In the [illegible] development shortly after the receipt of the H E W letter the State Board of Social Welfare recommended to Governor Rockefeller along with [illegible] that welfare grants be made uniform throughout the State of New York (New York Times, vol. CXIX, No. 40,884, November 24, 1969, P. 1, col. 2). On January 5, 1970 Governor Rockefeller in his message to the Legislature noted that "The Board has also recommended the establishment of statewide standards of public assistance." (Governor Rockefeller Message to the Legislature, January 5, 1970, p. 6.) And on February 9, 1970 the Governor submitted a budget bill to the State Senate (S. 7551) which would have established statewide uniformity in welfare grants.

SUMMARY OF ARGUMENT

There can be little reasonable doubt about the grave and irreparable harm that appellees would have suffered in this case without the preliminary injunctions. As the courts below found, their standards of need had been cut below the levels needed for the bare essentials of living. Their new standards provided from seven to sixteen percent less

than those for New York City recipients, even though the costs of essential needs are the same where appellees live as in New York City, except for certain items, such as household furnishings, which are more expensive where appellees live. Neither the standards for New York City nor the standards for appellees' counties provide for anything above the bare essentials, certainly not for what appellants have deemed the "higher social aspirations," such as money for carfare to cultural centers. Needed special grants, such as those for extra clothing, eyeglasses, special diets, and beds to sleep on, had been eliminated. The small amounts of money made available to appellees as a result of the injunctions represented a critical factor in the very ability to live and remain healthy.

Clearly, however, in light of this Court's recent decisions in *Rosado v. Wyman*, __ U.S. __ (1970), 38 U.S.L.W. 4266, and *Dandridge v. Williams*, __ U.S. __ (1970), 38 U.S.L.W. 4277, the district court erred in not determining whether appellees would probably succeed in their contention that the differentials in standard of need promulgated under Section 131-a violated the uniformity requirements of the Social Security Act. In order to avoid unnecessary determination of constitutional questions, this Court should consider the statutory argument especially since appellees fully briefed and argued it below. If, however, this Court concludes that it should have the benefit of the district court's opinion on the statutory issues, appellees urge that the Court remand the case to the district court for immediate consideration of the statutory issues, without disturbing the preliminary injunctions in light of the harm that would otherwise befall appellees. Such a remand is unnecessary, however, and this Court can proceed to a consideration of whether there is good reason to believe appellees will succeed upon the trial of the statutory issues.

A consideration of the pertinent HEW regulations makes it clear that the differentials in question do violate the federal uniformity requirements. The regulations require that

standards of need be statewide in scope. New York standards of need are not statewide. The regulations require that any exception to statewideness be based on objective data demonstrating that the cost of meeting the needs differs in various parts of the state. These differentials in standards of need are based on no objective data whatsoever. Moreover, as appellants' own testimony and arguments make clear, they are based on a recognition of *different needs* (rather than costs) for recipients in New York City as compared to recipients in Nassau or Westchester. Such disparate treatment is clearly forbidden under the HEW regulations. Moreover, no reason whatsoever exists to believe that persons in Nassau and Westchester and elsewhere do not have similar needs (such as the need to travel to day-care centers or welfare centers). Costs for meeting such needs as were recognized for New York City residents but not for Yonkers or Nassau residents are, in fact, higher in Yonkers and Nassau than they are in New York City.

HEW concluded in November 1969 that the differentials in standards of need do not appear to meet the uniformity requirements. All of the evidence in the record compels the same conclusion by this Court. For this reason, this Court should affirm the preliminary injunctions.

Appellants erroneously argue that the court below based its decision in favor of the preliminary injunctions upon the conclusion that a special equal protection standard should govern welfare cases. The court below, however, expressly noted that the differentials in question probably violate the "traditional" standard of equal protection. Unlike *Dandridge v. Williams*, U.S. , (1970), 38 USLW 4277, there is here no minimally rational reason for the differentials. Costs in New York City and its surrounding counties are the same (except for certain important items which are more expensive in the surrounding counties). Not an iota of evidence, not a bit of common sense supports the notion that the needy of New York City's five boroughs have "higher social aspirations" for which they

should receive a larger grant than the needy of the suburban counties surrounding New York City. No reason whatsoever exists for believing that an impoverished mother in Yonkers has less need to travel to a recreation center than an impoverished mother in the Bronx or Staten Island. Travel costs are, as demonstrated in the record, higher in the surrounding counties than in New York City. The notion that Queens recipients have "higher social aspirations" than Nassau recipients is not simply lacking in objective support. It is scandalously silly and obnoxious.

Appellants' other "rationales" are equally lacking in minimum rationality. The greater number of welfare recipients in New York City has absolutely no rational connection with the standard of need for individual recipients in New York City as compared to Yonkers or Poughkeepsie. The attempt of appellants to introduce new "evidence" of higher living costs in New York City on this appeal of the interlocutory orders to this Court is entirely inappropriate. Not only is the "evidence", *e.g.* that rent control produces lower rents for New York City residents which leads to deteriorated housing questionable and irrelevant on its face, not only does it ignore the existence of rent control in various suburban communities, but, of more relevance it should not be considered by this Court. Appellants may raise such matters with the court below. A trial on the issue of permanent relief awaits them as soon as this appeal is determined.

Appellants' claim that this case is not ripe for federal judicial determination is clearly erroneous in light of this Court's recent decision in *Rosado v. Wyman*, __ U.S. __ (1970), 38 USLW 4206. This court should affirm the preliminary injunctions on the ground that the court below did not abuse its discretion in finding that appellees would suffer irreparable harm without such injunctive relief and on the ground that appellants' differentials are in probable violation of the uniformity requirements of the federal act.

ARGUMENT

POINT I

The Court Below Did Not Abuse Its Discretion In Granting the Preliminary Injunction. Irreparable Harm Would Be Suffered by Appellees Without the Injunction. The Differential Which Has Been Enjoined Clearly Violates Federal Statutory and Regulatory Requirements. The Court Below Properly Found That the Differential Probably Violates the Fourteenth Amendment Under Traditional Equal Protection Standards.

It is, of course, of great relevance that this appeal is from an injunction pendente lite. The central issue of the appeal, therefore, is whether the court below abused its discretion in granting the preliminary injunction, not whether this court would have exercised such discretion in an identical manner. *United States v. Carrick*, 298 U.S. 435, 437-438 (1936). Put another way, the issues are whether there was an appropriate basis for the district court to conclude that irreparable injury would occur to appellees without such an injunction pending trial, and whether it is reasonable to assess the likelihood of appellees' ultimate success as substantial. *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Union Management Corp. v. Koppers Co.*, 360 F. 2d 190, 192 (2d Cir. 1966). As stated by this Court in *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929):

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application is denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable or may be adequately indemnified by a bond, the injunction usually will be granted."

Below we first discuss the nature of the irreparable injury that appellees would suffer without the preliminary injunction in this case. That injury flows from the enormous impact on the bare essentials of life for appellees that appellants' "slight differential" of approximately ten percent in standard of need would wreak. Thereafter we discuss the manner in which appellants' differential clearly violates federal statutory and regulatory requirements of uniformity in standards of need under state welfare plans. The Court below failed to determine the arguments on the statutory issue because it believed that it must defer to future consideration of the issue by H.E.W. The Court erred in failing to consider the statutory violation (see *Rosado v. Wyman*, __ U.S. __ (1970), 380 U.S.L.W. 4266), and this Court should uphold the preliminary injunction upon the basis of the clear statutory violation. Alternatively, this Court might remand this case to the Court below for that Court's determination of whether the statutory allegations of appellees provide an appropriate basis for the injunction.

In Section C of this Point we demonstrate that the Court below properly found a probable violation of Traditional Equal Protection standards. The totally frivolous "reasons" advanced by appellant to the Court below lack the minimum rationality found to exist in *Williams v. Dandridge*, __ U.S. __ (1970), 380 U.S.L.W. 4277 (decided this past week). Frivolous, too, are the "justifications" raised for the first time in this case in appellants' brief to this Court. Such new "justifications", especially in light of the confusion which surrounds what they actually consist of, are appropriately raised for initial consideration before the district court and not in this appeal. Finally, in the conclusion of this Point, we examine the limited and carefully drawn nature of the preliminary injunction.

A. *The Preliminary Injunction in This Case Is Necessary To Prevent Irreparable Injury to the Appellees and Other Members of Their Class Through Deprivation of the Bare Essentials of Life*

Repeatedly, throughout their jurisdictional statement and brief to this Court, appellants have referred to the "slight differentials" involved in this case. Appellants would have this Court believe that the injury here involved is not of any great consequence but, rather, is "slight". Without doubt, this contention of appellants is at the heart of this appeal. If appellants are correct, then the injury that appellees would suffer is *de minimus* and its irreparable nature questionable. The Court below, in its opinion, carefully considered appellants' contention and, with compelling arguments, rejected it. We raise some additional and supplementary considerations regarding the severe and irreparable nature of the injury appellees would suffer without the preliminary injunction.

Initially, however, it is helpful to keep in mind certain salient background facts. These facts, have been established in the affidavits and depositions of this case, are set forth at greater length in our Statement of Facts, supra, and are precisely the kind of factual issues among others which were and are to be subject to greater proof and demonstration in the trial of this action (if such trial is ever held).

First, we deal here with a differential established not by an addition in favor of New York City welfare recipients over July 1, 1969 levels realized by both city and suburban recipients, but rather by an extra large reduction of the standards of need for suburban recipients.[13] Second, the

[13] That grants were lowered as a result of the July 1, 1969 amendments to Section 131-a was found as a fact by the Court below, 303 F. Supp. 343 (A. 106). The increase just enacted by the legislature, see p. 30, *infra*, was granted for the purpose of adjusting the July 1, 1969 levels to cost of living increases since then and, clearly, not to

essential items for survival which composed the welfare grants prior to the reductions of July 1, 1969, did not include the needs raised by appellants in the preliminary hearing and in their affidavits below as the justification for their differential (primarily, the "higher social aspirations" in New York City; see section B, *infra*). Third, as the Court below found there was "not a scintilla of evidence" presented to the Court below that the cost of essential items for survival which made up the schedule of allowance and grant, differ in New York City and the surrounding suburban counties except insofar as costs were actually higher for certain items in the suburban counties. 303 F. Supp. at 147 and at 144, footnote 4.

Thus the differential between New York City and its surrounding suburban counties is one created by reductions in grants for essential items to the people in the suburban counties. How slight is the reduction in essential items measured in dollar terms, under the Commissioner's regulations, the difference starts with $3 for a single person grantee or 7% of his grant and ranges *beyond* 10% of the grant depending upon the size of the family.

Those who administer the grants at issue have testified to the critical nature of the dollar amounts here at stake. The Commissioner of the Nassau County Department of Social Services has testified that "the present (pre-July 1 1969) standards of assistance provide for life on a level of subsistence if nothing more, and often less. The standards which will go into effect on July 1, 1969 provide for even less." (Affidavit of Joseph V. Barham, [illegible])

It is instructive to consider the Department of Social Services' itemization of the mean monthly grant allotment (plus rent and fuel for heating) provided a family of four living in the suburban counties surrounding New York City.[15] The Department allocates $109.20 of that amount for food, of which $29.58 — about a dollar a day — represents food for the adult head of the household, and $26.55 — about 81 cents a day — represents food for each of the three children. The amount of $4.40 ($51.10 per person) is allocated for a month's expenditures on household supplies (or clothing). The adult is allowed $12.60 and each child $11.45, for a monthly total of $44.65. The adult is provided $3.00 monthly for personal incidentals; the children $2.00 each, for a monthly total of $8.00. Each child is allocated $1.00 monthly for school expenses. The family as a whole is allocated $6.85 for laundry and $14.15 for utilities.

Nothing, it should be noted, is allocated for recreation; nothing is allocated for a telephone; nothing for books, magazines, newspapers (unless they be deemed household supplies); nothing for transportation; nothing for medical expenses not covered by Medicaid; nothing for birthday or Christmas gifts; nothing for the expenses of belonging to a church or a Boy Scout troop.[16] As noted by the Heineman Commission with reference to welfare budgets:

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[15] All the figures are taken from a worksheet that comprised Exhibit B to the affidavit of George W. Cheshire, Acting Commissioner of the New York State Department of Social Services, submitted in *Rosado v. Wyman*, 322 [illegible] Supp. No. [illegible] (1970), 18 U.S.L.W. 4466.

[16] Well-off people easily forget that almost all social relationships depend on the ability to spend some money. To go to school costs money for books, notebooks, pencils, gym shoes, and to keep up with the other kids. Without these the child begins to be an outcast. To go to church costs money for Sunday clothes, carfare to get there, and a little offering. Without these one cannot go. To belong to the Boy Scouts costs money for uniforms, occasional dues, shared costs of a picnic. Without these the Scouts [illegible] cease to [illegible] Budgets of Despair, *Poverty in America*, supra, at 438-39.

> "There are many items for which no money is budgeted, although those items may be needed. Funds for them can only come out of sums already allotted to the basic necessities of life. As one witness told the Commission, 'I either eat good and smell bad, or smell good and don't eat.'" The President's Commission on Income Maintenance Programs, *Poverty Amid Plenty:* The American Paradox 16 (1969).

A study of welfare families in Nassau County found that "allowances for toys, ice cream, and movies are considered critical (but unprovided for) necessities for children." Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. Rev. 836, 843 (1968). We daresay that an occasional toy or ice cream cone numbers among the "higher social aspirations" of even the welfare children of Nassau County.

Let us consider some of the more fundamental implications of having to survive even on the more generous budget of New York City—which budget appellees continue to receive because of the preliminary injunction at issue:

> "[I]n New York City, with one of the highest levels of welfare payments in the nation, a nutritional epidemological survey of 642 New York City children, age 10 to 13, established that 73.2 percent of the children were judged to have poor diets. The children whose families were *not* on welfare had twice the frequency of satisfactory diet history as those whose families were on welfare." Citizens Board of Inquiry into Hunger and Malnutrition in the United States, *Hunger, U.S.A.* 72 (1968) (emphasis in the original).

We refer again to the finding of the Court below—which finding is totally without challenge by appellants—that there is not an iota of evidence that food costs are higher in New York City than in the suburban counties. We note also that the children and the elderly in Nassau, as elsewhere, who comprise the bulk of the class represented by appellees are

among the groups most vulnerable to the effects of an inadequate diet:

> "Various segments of the population are not equally affected by improper food. Adult men and women, for instance, can stand deprivation of food or the right food without permanent consequences much longer than small children, children in general, adolescents, old people, pregnant and lactating women; small children will die rapidly as they are very susceptible to malnutrition, pregnant women and lactating women will abort and stop making milk. Old people who are incidentally one of the most vulnerable groups in the Nation, because they are poor, because they have usually one or more chronic diseases which is essentially incurable and make them open to quack suggestions and finally because they are isolated and often live alone, are particularly vulnerable group." Testimony of Dr. Jean Mayer, *Hearings Before the Senate Select Commission on Nutrition and Human Needs*, 90th Cong., 2nd Sess., pt. 1 at 26 (1969).

Not only are welfare families poorly nourished, even in such a comparatively generous state as New York, but the evidence is that they are poorly dressed as well. A study of welfare families in New York City found that:

> "Thirty percent of the mothers on welfare with children in school said that at times they did not have the necessary shoes or clothes. Twenty percent reported that they sometimes kept the children home from school because they were ashamed of the way the children were dressed." Podell, *Families on Welfare in New York City* 45 (1968).

The Court below found not an "iota" of evidence that clothing costs were less in the surrounding suburban counties than in New York City.[17] The Nassau County study by

[17] While food and clothing prices are identical in New York City and Westchester and Nassau (as judged by a comparison of cost figures published by the local welfare agencies in those localities), household furnishings cost more in Westchester and Nassau than in New York City. See Footnote 4, 303 F. Supp. at 344.

Graham did find, however, that "the deep and chronic discontent over clothing allowances" in Nassau could be attributed in large part to the feeling of recipients that "a deficient wardrobe, especially among schoolage children, is the most visible and therefore the most humiliating badge of poverty and welfare status". Graham, *supra* at 896. Clothing one's children decently may not be a "high level of social aspiration", but it is an aspiration apparently not met by present welfare schedules in Nassau. Obtaining adequate clothing or food while on welfare and, in general:

> "simply getting by (on a welfare budget) is a rigorous occupation, requiring exercise of great acumen, considerable purchasing skill, and enough flexibility to take advantage of marketing breaks of all types. It has required major effort and energy to maintain what has turned out to be a monotonous, depressing level of existence." Wedemeyer, *Maintenance Standards and Incentives* 4 (1969).

One can—and should— consider with particularity the impact of the differential at hand on food and clothing. To illustrate, in terms of the $191 received by a family of four in Nassau under appellant's schedule, the $17 grant increase that would result from bringing suburban grants up to the level of New York City grants could be translated into a 40 percent increase in the amount available for clothing.[18] Alternatively it could provide a 17 percent

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[18]One can, with even greater particularity, consider the actual items of needed clothing and household supplies that $5 per person per month purchases. The Nassau County Department of Social Services has published a Price Guide (A. 175-209) that provides a convenient reference for this purpose. Following that price list:

> An adult woman, for example, could use the additional $5 to buy a cotton dress ($5.00), a sweater ($5.00), a pair of slacks ($4.00 for summer slacks or $5.00 for winter slacks), a girdle ($5.00), six pairs of stockings (80¢ each), or a pair of galoshes ($4.00). (A. 181).
>
> Her male counterpart could buy a pair of summer trousers ($5.00), a hat or cap ($4.00), a bathrobe ($5.00), five under-

increase in the amount available for food, or a 100 percent increase in the amount available for personal incidentals, or simply a 10 percent increase in the amount available for all budgeted items.

However viewed, the grant differential represents very substantial and irreparable losses indeed. (With regard to actual impact on the named appellees of the cuts they suffered under § 131-a, we respectfully refer the Court to

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shirts (90¢ each), or a pair of galoshes ($5.50). (A. 182).

A boy age 12 to 15 could use a $5 increment to buy a raincoat ($5.00), a bathrobe ($4.00), a sweater ($5.00), a light jacket ($4.50), or a pair of sneakers ($4.00). (A. 180).

His sister age 12 to 15 could buy a skirt or pair of stretch pants ($5.00) a sweater ($4.00), a bathrobe ($5.00), two cotton juerseys ($2.50), or 12 pairs of socks (40¢ each). (A. 179).

A family could spend $5 on the household by buying an alarm clock ($3.00). (A. 183), an electric grill ($4.00), a 10" frying pan and a two-quart saucepan ($2.50 and $2.00), (A. 184), a straight chair ($5.50), a washable rug ($4.00) (A. 185), or a lightweight blanket ($5.00) (A. 186).

If the family saved its increment for two months and made its purchases in $10 units, the mother could buy a dressy dress ($9.00), a pair of shoes ($9.00), three blouses ($3.00 each), three slips ($3.00 each), three bras ($3.00 each), or three nightgowns ($3.00 each). (A. 181).

A male adult could buy a light jacket ($8.00), a sweater ($7.00), a pair of shes ($10.00), or three shirts ($3.00 each). (A. 182).

The son could buy three shirts or three pairs of pajamas ($3.00 each), three cotton jerseys ($3.00 each), or a pair of shoes ($9.00). (A. 180).

His sister could buy a dressy dress ($9.00), a swimsuit ($9.00), a pair of shoes ($7.00), or three pairs of pajamas ($3.00 each). (A. 179).

The household could acquire for $10 five sets of dishes ($2.00 per place setting), an electric iron ($11.00) (A. 183), an electric toaster ($11.00) (A. 184), or a kitchen table ($10.00), (A. 185).

our detailed description in the Statement of the Case, *supra*).

It is for such reasons that the Court below correctly concluded with regard to the differentials so casually labeled by appellants as "slight", that:

> "while this (differential) may seem minor to most citizens, it is of crucial importance to the recipients here, who present tragic hardship cases, some of them already the victims of severe cutbacks in other forms of special aid formerly received (e.g. telephone service for medicines and groceries: food for seeing-eye dogs; transportation allowance to hospitals; special diets for diabetics; readers for the blind; "homemakers" for those confined to wheelchairs, etc.). To an indigent person now receiving approximately 90¢ per day for food, an additional 15¢ per day can hardly be described as *de minimus*. Access to such bare necessities of life, on a non-discriminatory basis, involves a critical interest for those whose life depends on it." 303 F.Supp. at 348 (A. 114).

In *Dandridge v. Williams* ___US ___(1970), 38 U.S.L.W. 4277, this Court, just this week, noted that the public assistance grant "involves the most basic economic needs of impoverished human beings." This "dramatically real factual" circumstance may not call for the application of a special constitutional standard to welfare clients. Inescapably, however, this circumstance is at the heart of the issue here discussed. Depriving appellee-plaintiffs of an amount equivalent to 7 to 10% of their monthly welfare grant, and more, is to wreak an irreparable injury upon them. When, effective July 1, 1969, the New York State Legislature deprived appellees of access to special needs standards for grants, the needs standards of appellees were severely lowered. The extra reduction imposed upon these appellees, over and above the special needs reductions (also lost by New York City recipients), constituted an extreme injury with regard to the very essentials of life for appellees. The Court below properly restrained appellants from inflicting this injury pending final adjudication—especially in light of the merits of appellees' case, which we next discuss.

B. *The Differential in Standards of Need For Recipients Living in New York City and Those Living in the Surrounding Counties Violates the Uniformity Requirements of the Social Security Act.*

A clear—and indeed virtually indisputable—basis for concluding that appellees will probably succeed upon final adjudication is found in appellee-plaintiffs' contention that § 131-a and the appellants' implementing regulations violate the "Uniformity" requirements of the federal statute and regulations. Appellees briefed and argued this contention in the district court. That court, however, after summarizing the strong nature of appellees' argument concluded:

> "Plaintiffs' non-constitutional argument, however, is based primarily on regulations promulgated by H.E.W. Since the schedules and regulations adopted by defendants are now under review by that agency, which possesses considerable expertise with respect to its own regulations and should be entitled to interpret them in the light of the complexity of problems presented by various welfare programs, see 45 CFR 233.10(1), we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W." 303 F.Supp. at 350 (A. 119).

The lower court's opinion was handed down on August 4, 1969, well over eight months ago. Since then, two events have made clear that there is no further need to delay a judicial conclusion on appellee's statutory contention.

Most recently, this Court has made clear in *Rosado v. Wyman*, ___ U.S. ___, 38 U.S.L.W., 4266, 4268 (April 6, 1970) that deferral to HEW in cases such as the instant one is inappropriate. The Court did note that federal courts should seek the views of HEW where HEW has not elsewhere set forth its views or where "there is real doubt as to how the Department's standards apply to the particular state regulation or program." 38 U.S.L.W., at 4268. In this case, there is no real basis for doubt as to the

import of the federal regulation. There is no need for further delay as to the views of HEW. All of the justications for the state differentials in issue that were presented to the district court have also been presented to HEW. Indeed, on November 10, 1969, over five months ago, James Callison, Regional Commissioner of HEW wrote to appellant Wyman and described the reasons given by New York to justify the differential as "difficult to understand". (A. 172, 173) In concluding, Mr. Callison stated:

> "Given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the state." (A. 174)

In light of *Rosado, supra*, a case dealing with different aspects of the same New York statute involved in this case, there can be little doubt that the district court erred in not determining the probabilities of appellees' success on the statutory claim. Certainly HEW's conclusion, expressed on November 10, 1969, should settle any possible doubt as to the appropriateness of a judicial determination.

Appellees urge this Court to affirm the preliminary injunction on the basis that the court below did not abuse its discretion in finding that irreparable harm would be suffered by appellees without such an injunction, and because there is strong ground to conclude that appellees will succeed in their statutory contention. In that manner, this Court will meet the judicial obligation "to adjudicate this statutory claim in preference to deciding the original constitutional claim". *Rosado v. Wyman, supra*, 38 U.S.L.W. at 4267; *Dandridge v. Williams, supra*, 38 U.S.L.W. at 4278 (April 6, 1970). In the alternative, if this Court should wish the district court to reach the statutory issue before this Court considers it, we urge a remand for immediate consideration of the statutory issue—without disturbing the preliminary injunctions, in view of the harm that would otherwise befall appellees. We believe this alternative

unnecessary, however, and urge affirmation on the statutory grounds as argued hereafter.

Below, we first discuss the nature of the federal uniformity requirement. Thereafter, we discuss the manner in which the New York statute and regulations violate the uniformity requirement. We wish also to make reference here to the excellent discussion of the statutory issue in this case in the *amici curiae* brief of the Center on Social Welfare Policy and Law and the County of Nassau. In Section C of this point, we demonstrate why the preliminary injunctions should be affirmed on the ground of probable success under the traditional equal protection standard.

1. The Social Security Act and the Regulations promulgated thereunder require that the State promulgate statewide standards of need, determined upon an objective and equitable basis and uniformly applied to individuals in like situations throughout the state.

The present federal insistence on statewide uniformity in public assistance programs is deeply rooted in the history of the Social Security Act. Prior to 1935, public assistance programs operated on a local basis and recipients in each district received whatever grants the local agency or governing body deemed appropriate.[19] For the most part, assistance to the aged and to dependent children was optional at the local level. Because there was no statewide standard, the poor families within each state were subjected to totally arbitrary variances in providing for their basic needs, from some amount to zero, depending on the local

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[19] A leading commentator has said of this period: "Studies of the administration of poor relief in the period when local responsibility was dominant found inefficiency, political favoritism, and occasional fraud to be the characteristic elements." Steiner, *Social Insecurity: The Politics of Welfare*, p. 16 (1966).

county's disposition to provide budgetary allocations for the poor. Serious inequities resulted whereby families in entirely similar situations were provided drastically different allowances. As noted by the Advisory Commission on Intergovernmental Relations:

> "By 1934, the year prior to the passage of the Social Security Act, the States had made some progress in establishing public assistance programs. However, coverage of needy persons in any of the aforementioned groups was far from complete throughout the country. The Social Security Board in its First Annual Report summarized the situation as follows:
>
> (1) Only thirty of the fifty-one jurisdictions (states and territories) had legislation permitting or providing old-age assistance;
>
> (2) within this thirty, one third of the counties did not provide old-age assistance;
>
> (3) in most of the counties where assistance was provided, the qualification requirements were highly restrictive and lack of funds resulted in long waiting lists;
>
> (4) forty-five states authorized aid to dependent children, but it was provided in less than half of the local units in these states, and
>
> (5) in the twenty-four states with laws for public pensions to the blind, only two-thirds of the counties participated in these programs."
>
> Advisory Commission on InterGovernmental Relations, *Statutory and Administrative Controls Associated With Federal Grants for Public Assistance* (1964) at p. 4.

The United States Congress recognized that the instability and unfairness of this kind of patchwork, unequal treatment of marginal families within a state was a fundamental concern, nationwide, and accordingly enacted the Social Security Act with primary emphasis being placed upon uniform, equal treatment of similarly situated persons. (See

generally, Brown, "Public Relief, 1929 to 1939," 1940, p. 16.) Hence, from the inception of federal participation in the public assistance field, a paramount policy in federal administrative action was to correct the ills caused by previous uneven provision of basic needs, and to positively support the fundamental notion of equal treatment within each state:

> "The (Social Security) Board had interpreted the stipulation of a 'state plan' to require a state to establish statewide standards for determining eligibility and creative needs so that persons in equal circumstances would be treated equally throughout the state." Altmeyer, *The Formative Years of Social Security*, (1968), p. 264. See also pp. 80 et seq and 191.

In fact, however, three statutory provisions have long been relied upon by HEW to justify the "uniformity" requirement. See *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance, supra*, at pp. 12-13. These statutory provisions are: (1) The requirement that each state welfare plan must be in effect in all political subdivisions of the state; (2) the requirement that there be statewide financial participation in each state welfare program; (3) the requirement that a "single state agency" must be designated to administer the program.[20]

In interpreting these statutory provisions HEW has held that:

> "The purpose of the requirements relating to statewide operation is to assure that the public assistance program in which there is federal financial participation will be in effect throughout the state; that local offices will be available where persons can apply for assistance and services; *that the benefits of the programs will be equally available to all eligible*

[20] 42 U.S.C. § 602 (a) (1), (2), and (3) and § 1382 (a) (1), (2), (3) contain their respective provisions for AFDC and the combined AABD programs.

persons; and that state policies, standards and methods will apply equally to persons in like situations wherever they may live.

"Where the program is administered by political subdivisions under state supervision, the state agency is responsible for assuring that the state program and state rules and regulations are in effect in all political subdivisions. *This means that the specific eligibility factors for each assistance program, including resources and standards of need, and any additional eligibility factors included in the approved state plan are uniformly applied in areas, offices or political subdivisions.*"

Handbook of Public Assistance Administration, United States Department of Health, Education and Welfare, Part II, § 4300, (hereinafter referred to as HEW Handbook.) (Emphasis added.)

Moreover, each State is responsible for providing assistance "on a basis consistent with equitable treatment of all eligible individuals in similar circumstances throughout the State, in accordance with the intent of the Social Security Act" and must avoid "inequitable provision for assistance and administration among localities within a State..." *HEW* Handbook, Part II, § 3300.

"State and federal funds will be apportioned among the political subdivisions on a basis consistent with equitable treatment of individuals in similar circumstances throughout the state." HEW Handbook, Part II, § 3200.3.

The most recent, relevant HEW regulations provide, among other things, that state welfare plans must meet the following requirements:

"1. General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis..."

2. *Standards of Assistance*

(i) Specify a statewide *standard*, expressed in money amounts, to be used in determining

(a) the need of applicants and recipients and
(b) the amount of the assistance payment.

* * *

"(iii) Provide that the standard will be *uniformly* applied throughout the State." 45 CFR § 233.20 (a); 34 Fed. Reg. 1394 (January 29, 1969) (Emphasis added.)

In effect, then, the three statutory requirements set forth in the Social Security Act (state financial participation, statewide plan, single state agency) are "closely related" and have the underlying objective of "facilitating statewide maintenance of the standards of each State plan." HEW Handbook, Part II, § 3200.3. Such statewide standards must be "objectively" determined. 45 CFR § 233.20(a).

Thus, federal law expressly seeks to insure evenhanded application of standards within each state. The dispensing of a varying, non-uniform standard (of need as represented by the allowances) is prohibited in state programs receiving federal funding. For example, a special disability allowance, if it is to be legally implemented in a state plan, must be provided in all districts, not in a certain few to the exclusion of others. Likewise, a special grant for the "social cost of living", primarily composed of the transportation to recreational facilities, must be determined on an objective basis uniformly available throughout the state wherever needy people experience that "social cost". If the standard of need in one part of the state includes a grant for transportation to day care centers, and people in another part of the state also have a "social need" for transportation to day care centers, the latter people must also have the benefit of the special grant.

Sudden, arbitrary and irrational fluctuations between regions are in effect prohibited by the Social Security Act as violations of statewide uniformity requirements. The ultimate test of the state's compliance with the Act's uniformity dictates is whether differences in provisions to various localities are based upon rational cost of needs factors.

> "In summary, the State standard must represent items of need to be made available to all recipients statewide. *Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in various sections of the the State.*" (Emphasis added.) Letter from James Callison, HEW Regional Commissioner to George K. Wyman, dated November 10, 1969 (A. 172).

Without such requirements, a fragmented and piecemeal state plan would result, creating random discrimination dependent upon political considerations wholly unrelated to the meeting of individuals basic needs. Such a result would violate the Social Security Act, and, until the state is properly ordered to restore uniformity would mean that federal funds dispersed to such a non-conforming state would be completely misspent.[21] Where a drastic differential is imposed between different "political subdivisions" within a state, as was imposed here by the State when it fragmented the greater metropolitan New York City area, the State must demonstrate that its plan is still "statewide", "objective and equitable", "uniformly applied throughout the State" and representative of "State policies, standards and methods [which] will apply equally to persons in like situations wherever they may live", HEW Handbook, Pt. II, § 4300; 45 CFR § 233.20(a)(1), (2), 34 Fed. Reg. 1394 (1969). Cf. *Zemel v. Rusk*, 381 U.S. 1, 11 (1965).

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[21] The lower three-judge court, while deferring to HEW on New York's compliance in fact with the requirement of uniformity, indicated its view on the meaning of statewideness:

> "On their face the foregoing provisions of the Social Security Act regulations would appear to be aimed at the fundamentally sound objective of assuring that persons in like circumstances should be treated equally throughout a state rather than exposed to the type of unfair hodgepodge that could result from adoption of different eligibility standards or other criteria for different areas." 303 F.Supp. 350-351 (A119).

2. New York's Provision of Significantly Lower Need Standards for Recipients in the Seven Counties Surrounding New York City than Those For New York City Recipients Violates the Social Security Act's Requirement of a Uniform Statewide Standard of Need.

The provision of differentials by § 131-a, whereunder the standards in the counties surrounding New York City are lowered below those of New York City, deviates sharply from the uniform standards which had existed for years.[22] In New York City and the surrounding counties, the common standards previously promulgated by appellant Wyman were based on revised pricing studies made each year. All previous studies indicated that there were no cost of living variations throughout greater New York City. The last of these was a 1968 pricing study upon which appellant Wyman's 1968 schedules (providing uniform allowances) were based. The only prior variation in cost of meeting needs throughout the whole state was for utility expenses and even this variation did not exist between New York City and its surrounding counties.[23]

It is against this background, when § 131-a and 18 NYCRR 352.4 fragmented the New York metropolitan area and reduced subsistence levels of one group of its recipients below those of another, that HEW firmly placed the burden upon the State to justify this departure from uniformity. On April 16, 1969, well before the statute was to take effect, the Regional Commissioner for HEW wrote to appellant Wyman, demanding that New York produce:

> "supporting data. . . demonstrating that the differentation in maximums between New York City and all other areas of the state is not inconsistent with

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[22]See A. 41, Deposition of Appellant Wyman.

[23]As noted by the court below, however, welfare agency pricing lists indicated that household furnishings were more expensive in the suburban area than in New York City. 303 F. Supp. at 344, footnote 4. (A. 122).

> statewide requirements . . . while variations in amounts used in determining need and payments may be justified on the basis of differences in the cost of living in local areas. This is a factor to be taken into consideration in establishing the statewide standards which could then be applied uniformly in all areas with the same characteristics." Letter from HEW Regional Commissioner James Callison to George K. Wyman, April 16, 1969, cited by lower court, 303 F.Supp. at 351 (A. 119).

Further, as HEW noted, Subdivision 4 of Section 131-a, the statutory provision authorizing appellant Wyman to promulgate schedules of higher allowances to the surrounding counties (up to the New York City level) does not itself cure the defect of non-uniformity if equal schedules are not in fact effected by the Commissioner, nor does that discretion alter New York's burden of demonstrating compliance with federal uniformity requirements.

> "In this regard, we do not question that § 131-a (4) of the Social Services law would authorize a method of operation which is consistent with statewideness requirements. However, there must be assurance that in implementing such provision, *you will undertake to maintain the proper relationship to local costs* and to exercise your power to promulgate revised schedules in any case in which you determine such revision is called for, i.e., that such action is not dependent on a request or application therefor by local authorities." Letter from HEW Commissioner James Callison to George K. Wyman, dated November, 1969 (A. 172). (Emphasis added).

Before examining the appellant's attempts to justify the differentials, we should again note precisely what is and what is not included in the allowances at issue herein. The basic monthly grant is to meet a person's or family's minimal needs for food (over half of the grant), clothing, household supplies, furniture, laundry, utilities, and personal incidentals (toothpaste, aspirin, shaving utensils, and supplies). *Nothing* is allocated for a telephone, books, news-

papers, *transportation or recreation*. And the basic grant does *not* include rent, a fact which appellants repeatedly ignore. Hence, component items in the grant are specific. The [federal] regulations earlier cited require that whatever a state designates as the component items (which, when totalled, yields the state standard of need) must be in effect throughout the state. Hence, if the grant in Albany County includes meeting the need for a certain item, such as razor blades, that "item" must be included as a need within the standard throughout the state (at least wherever men shave)—in all districts.

In response to HEW's demands for data supporting the sudden departure from past uniform practices caused by Section 131-a—and in response to the instant lawsuit—what data and what justifications were offered by appellant? More so than could any argument, the testimony of appellant Wyman in this case makes crystal clear the frivolous nature of the justification presented to the court below (and to HEW) for the differentials at issue. The basic rationale for the differentials prohibited by the preliminary injunction was stated by appellant Wyman in his deposition:

"Q - Why is there now a 7 to 10 percent differential between families in New York City and families in the counties formerly on SA-1?

A - The essential differences are the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements.

Q - And the additional grant of approximately $4, it was your testimony, although it is a bit more, is to cover transportation to these facilities?

A - Yes."

Upon what basis did appellant reach his conclusion? (A. 60):

"Q - In establishing these differentials, did you make a study of the relative availability and usage of museums, clinics, community centers, cultural institutions in New York City, in Westchester County, in Nassau County, and so on?

A - No."

Commissioner Wyman then showed a letter he had earlier submitted to HEW in which he set forth his basic rationale with greater specificity, indicating particular transportation needs. He was asked (A. 64):

"Q - Are you aware of the transportation system in Nassau County.

A - No.

Q - Are you aware that there are at least 17 separate franchised bus lines without interchange between them?

A - No.

(47) Q - Are you aware that the minimum fee is a minimum of 25 cents?

Mr. Hoffman: I object. These are leading questions.

Q - Do recipients, to your knowledge, have a need for transportation to their welfare centers in Nassau County?

A - I should imagine so, on occasion.

Q - Approximately the same as recipients in New York City?

A - I don't know.

Q - No reason to believe otherwise?

A - No reason to believe otherwise.

Q - Are you aware of recreational—the second illustration in this letter is recreational centers for the aged. Are you aware of recreational centers for the aged in Nassau County?

A - No.

Q - Are there any, to your knowledge?

A - I don't know of any.

Q - But you don't know that there are not?

A - No.

Q - The same is true for Westchester County?

A - Right

(48) Q - There are more in New York City?

A - Yes.

Q - Are you aware of day care centers for children in Nassau County?

A - Yes.

Q - There are?

A - There are some.

Q - And there are day care centers for children in Westchester County?

A - Yes.

Q - And for those people who need to use them there are transportation costs involved?

A - Yes.

Q - To the extent that their transportation systems cost more than New York City, the cost is more?

A - That is correct.

Q - Are you aware of cultural recreational facilities in Nassau County and Westchester County?

A - No.

Q - You think there are none?

A - I just don't know of any.

Q - To the extent there are, people would use them as in New York City?

(49) A - That's right.

Q - And transportation costs would be involved to get there?

A - Yes.

Q - Another illustration used here are beaches. You are aware of beaches in New York City?

A - Yes.

Q - And you are aware of transportation to get to them?

A - Yes.

Q - And one could get to those beaches from one subway ride?

A - Yes.

Q - That is 20 cents and for the aged 10 cents?

A - Yes.

Q - There are beaches in Nassau County?

A - Yes, I am sure there are.

Q - And there is no subway system to make it quite so convenient, is there?[24]

A - No.

Q - The same would be true of parks?

A - I would assume so.

Q - So these are items of budgeted need for people in New York City that are not items of budgeted (50) need for people in Nassau County and Westchester County?

A - That is correct.

Q - So there is a difference . . .

A - Budgeted in the sense of explaining the differential.

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[24]See affidavit of Planning Commission, Director John Burdis (A. 70). Transportation in New York City is in fact comparatively cheap as the subway system reaches most points of need or interest at 30 cents per ride (20 cents at the time of lower court ruling). In contrast, public transportation in Nassau and Westchester is cumbersome and expensive.

Q - Reflecting itself in the amount of money being given to people and the calculation of the grant?

A - Right."

Finally, admitting candidly the State's use of two or more standards of need (A. 76):

"Q - When you promulgated the schedule for the suburban counties, did you also take into account the need for cultural and visiting cultural facilities in those communities?

A - No, not to the same extent."

3. Other Rationales Offered by Appellants Below.

In their jurisdictional statement (p. 7) and below, appellants argued, "Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients in New York City–889,000 out of 1,211,000 in the State (1968 Monthly average)." We readily confess that we do not understand why the Legislature–or appellants–consider this a factor. The appellants appear to have confused basic matters. Certainly the Legislature may have wanted to consider the larger numbers of recipients in New York City for the purpose of examining why the public assistance rolls were growing, for the purpose of helping meeting extra administrative costs in New York City, etc. Its foolishness as an explanation of differential treatment in meeting the needs of recipients, however, is too obvious for further comment by us. A recipient in New York City does not need more food than a recipient in Westchester because there are more recipients in New York City. This rationale cannot possibly justify deviation from uniformity requirements.

In a similar irrelevant vein, the appellants cited below, and to this Court, somewhat higher actual welfare payments in New York City, on the average, than elsewhere.[25] How-

[25]On examination below, appellees' counsel cited New York State Department's published figures for October, 1968, showing payments

ever, it is *not actual payment but standard of need and allowance* that is relevant. One recipient may receive less than another recipient with an identical standard of need because he has somewhat more income than the other recipient. The actual grant is the difference between income and standard. The consequence of lowering a *standard* in a locality, because of a lower *payment* average, would be to penalize the recipients of that locality by leaving them with less total income (welfare plus private income) than recipients of another locality who have no private income.

The appellants do not explain whether recipients in Nassau County receive more support payments than those in New York City, or work more, or receive more social insurance payments. Nor does their brief explain what appellants have admitted in *Rosado, supra*: that much of the variation in actual payment was due to the variation in the manner in which local agencies administered special needs requirements.[26] Certainly, however, no possible rationale can be found for a lower *standard of need* from the fact that averaged payments differ from locality to locality.

The appellants' justifications to the Court below are tantamount to saying, "We can create any differentials we want despite the uniformity requirements. We don't have to show any reasons. We need only make bald assertions, no matter how unsupported or without reason they may be."[27]

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in Nassau and Westchester were higher than in New York City. They were unexplained by appellant Wyman (A. 88).

[26]Affidavit of Acting Social Services Comm. Chesbro, *Rosado v. Wyman*, O.T. 1969, No. 540, Appendix, p. 98.

[27]Appellants also cited a blatantly misleading "justification" to the Court below and continue to do so before this Court. The argument, briefly, is that New York City recipients received for some nine months prior to July 1, 1969, a "cyclical" flat grant of $100 per person above their "recurring" allowance. Recipients outside of New York City did not. Appellants argue that this justifies the extra-differential for New York City recipients post July 1, 1969, quoting

4. Appellants Raise New Arguments in this Court, not Raised Below, in Favor of Differentials.

Since the issuance of the preliminary injunctions and the filing of this appeal, the appellants—in their brief to this Court—seek to justify the differentials on evidence that "the actual cost of living" of a welfare recipient in New York City "is in excess" of that of a welfare recipient in the surrounding counties and "the Legislature was fully cognizant of this fact". (p. 25 Appellants' Brief). What is the evidence of higher "actual cost of living of a welfare recipient in New York City?" Appellants introduce in this Court three arguments for higher costs in New York City.

Appellants argue that there is a higher crime rate in New York City than in its suburbs. (pp. 28-29 Appellants' Brief). While we doubt the comparative significance of appellants' statistics, such statistics are largely irrelevant. Even if New York City recipients suffer greater theft of welfare checks, the pertinent regulations provide that stolen checks may be replaced (and in fact they are), 18 NYCRR 352.4(9)(10) (reissued Sept. 10, 1969). And so may stolen cash be replaced: Cf. 18 NYCRR § 372.3. Thus, the possibility that a New York City recipient may suffer a greater chance of a stolen check (which will be replaced if stolen) hardly justifies a larger check in the first place.

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part of their initial application to HEW for permission to establish the cyclical grant in New York City. (p. 32-33 Appellants' Brief). What appellants fail to explain is that the cyclical grant was approved by HEW as a "demonstration" procedure under Section 1115 of the Social Security Act for the purpose of testing a *new method* of administering grants. The extra-cyclical flat grant in New York City was to replace the extensive list of "special" grants for clothing, furniture, and the like. *These "special" grants continued in effect in the suburban counties and upstate.* HEW approved merely a different method of meeting need but not a method of meeting different needs. (A. 53). *The new schedules of July 1, 1969, wiped out the "special grants" outside of New York City* while the differential in favor of New York City continued, at least in part, the protection of the "cyclical" flat grant.

Next, in an extraordinary example of obtuse thought, appellants argue "housing costs for New York City were by far the lowest throughout the State" and the Legislature knew it. Appellants do not state how the Legislature knows this, but they do state why New York City housing costs are low: rent control. How do lower rental costs in New York City than in Nassau or Westchester justify higher welfare grants in New York City? Rent control, appellants assert, citing various studies, leads to deteriorating housing which is abandoned and withdrawn from the market and that leads to "capital losses". The families save money but the market loses housing units. (p. 26-27, Appellants' Brief). And, somehow, the cost of living for welfare families in New York City increases.

The appellants, naturally, do not examine whether or not welfare recipients in the surrounding counties also live in deteriorating housing. They do not examine how well the landlords do or do not make needed repairs there. They have, we feel safe to assume, not even inquired into the subject. Nor do they recite that rent control exists in Nassau County, Yonkers, White Plains, New Rochelle and parts of Monroe County.[28] They rely simply on their formula: rent control leads to cheaper rents which lead to capital losses and withdrawal of housing units from the market.

Of course, if there is any conceivable merit to appellants' new evidence of higher living costs in New York City, the appropriate move for appellants is to go to trial and show their evidence to the district court. Upon trial, appellees can examine appellants on the matter and the district court can weigh the evidence. Such claims are not appropriately raised for the first time before this Court. Compare *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575 (1887).

Equally inappropriate for raising before this Court at this time is appellants second new piece of "evidence" allegedly

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[28]See 9(C) NYCRR 2100.8.

establishing higher living costs in New York City. This argument is that New York City sales taxes total (State and City) 6%, while Nassau sales tax totals 5% and Westchester totals 3%, except for Yonkers which is presently 6%. (p. 28, Appellants' Brief). Aside from the apparent lack of justification for a $5 differential per person resulting from these various sales taxes, we note the existence of other sales taxes in Suffolk, Ulster, Broome, Greene, Monroe, and Dutchess Counties. Monroe County has a total sales tax of 6% (just as does New York City, as does Yonkers). See CCH, *State Tax Reporter*, Vol. 2, § 6593-5.

Moreover, appellants fail to apprise the Court of the impact of such taxes on the essential items the welfare grant is intended to purchase. For example, food (as well as many other necessaries) are not subject to the sales tax. Nor do appellants tell us whether the cost of living studies which constitute the basis for welfare grant schedules, and which report identical food and clothing prices among New York City, Nassau and Westchester, and higher furniture costs in the suburban counties,[29] include or exclude sales tax computations. However, the appellants' department, in issuing former Regulation 352.4, Title 18, NYCRR which was based on the latter cost of living studies, stated the purpose of the monthly grant was to cover expenses of food, clothing, household supplies, etc., "including sales taxes related thereto." See Footnote 3, 303 F.Supp. at 3. (A. 122). The department, in issuing the latter regulation, found no sufficient difference in total cost of such items in New York City and the surrounding counties to warrant a differential. Upon the basis of what information do appellants now find a difference in costs? Appellants admittedly made no new studies.

Our point, once again, is two fold: first, appellants new "evidence" is woefully inadequate in every way; second, if there is indeed any conceivable merit to appellants new claims, they are appropriately raised before the district

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[29]See Footnote 4, 303 F. Supp at 344. (A. 122).

court, and not for the first time (on appeal) to this Court. A trial, which was originally set for October 6, 1969, and was delayed because of this appeal, continues to await appellants.

Clearly, appellants, as an afterthought to legislative creation of the differential, have simply tried to conjure up facts as to New York City without any consideration of their existence or applicability to other areas. Such a transparent attempt to disguise evasion of uniformity requirements cannot be tolerated if the Social Security Act's insistence upon statewideness is to have any meaning whatever.

New York has, in the past, exhibited a pattern of nonconformity. In 1950-51, it was the only state refusing to adopt statewide standards for determining eligibility for public assistance. Then the state refused to accept the federal interpretation that state-widedness required uniformity in grant levels where the costs of meeting needs covered by the grant were uniform. After extensive negotiations with federal authorities, wherein a joint study group demonstrated to New York's surprise that there was "very little difference between New York City and upstate New York, except for rent," the state recanted its position. Altmeyer, *The Formative Years Of Social Security*, 192 - 193 (1968). See Steiner, *Social Insecurity*, *supra* at 110. Accordingly, statewide standards were implemented on a uniform basis. Now, unfortunately, New York is attempting to revert to its old method of piecemeal meeting of needs.

In summary, then, the evidence compels the following: Even though less money was available in Nassau, other suburban counties, and in New York City for basic items such as food and clothing after the July 1, 1969 schedules were issued,[30] an extra differential of 7 to 10 percent and more

[30]It is critical, we believe, to keep in mind this fact when considering appellants' arguments. Appellee Rothstein, for example, received a total of $20.88 *less* for necessities after the July 1, 1969, schedules were issued. The five dollars received as a result of the preliminary injunction hardly accounts for this loss. Appellee Batson, it

was established in favor of New York City on the ground that recipients in New York City need to pay for transportation to beaches, clinics, welfare centers, day care centers, recreational centers, and the like. However, no study (objective or otherwise) at all was undertaken with regard to the existence of these centers or their use in the suburban counties, though obviously some or many exist there and are used. In fact, transportation costs are considerably higher in the suburban counties even though the extra money is given to New York City recipients.

But, appellants argue, though it may *cost more* for recipients in Westchester or Nassau to visit a beach or welfare center than it does for recipients in New York City, recipients in New York City have a "greater need" for such transportation. (Appellants' Jurisdictional Statement, p. 22.) Why is that so? Because, according to appellants' Senior Attorney, Vernon Murphy, New York City recipients have a "higher level of social aspiration". How does Mr. Murphy (or the appellants) know this? There is simply silence in response to such a question.

Counsel for appellees, having served on past occasions welfare recipients in both New York City and in Nassau and Westchester, might seek to assure the Court that their suburban clients have as high a "social aspiration" as their city clients. But surely such assurances are uncalled for. A ten percent differential in welfare grants, severely affecting the meager cash available for such basics as food and shelter, may not—consistently with the Social Security Act—rest on subjective speculation concerning the aspirations of the poor and needy of Yonkers in comparison to the poor and needy of the Bronx with regard to visiting beaches.[31]

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might be added, received about $100 less. (See Statement of the Case, *supra*.)

[31] At the very least, someone ought to *ask* the welfare poor of Yonkers about their aspirations on this subject. The conclusion of the court below could not be more correct: ". . . Even if it could be shown that a part of such [welfare] payments is used for these [re-

It is to be recalled that the federal regulations require that differences in need standards be based upon objective data, that individuals in varying parts of the state be treated equally, that the individual in Yonkers who has a need to visit a beach, welfare center, or day care center have that need recognized if such a need is recognized for the individual in another part of the state.

The issue on this appeal, of course, is not whether—upon final adjudication—the state will finally have found some basis, consistent with the Social Security Act, for its decision to grant a higher need standard for the "social aspirations" of the people of Queens as distinguished from the people of Yonkers or Poughkeepsie. The issue is merely whether there is, at this time, good reason to believe that the federal uniformity requirement has been violated—thus justifying the preliminary injunction. The conclusion that the uniformity requirement has been violated appears clear.

The HEW Regional Commissioner stated in his November 10, 1969, letter to appellant Wyman (A. 172):

> "In your letter of June 2, 1969, you indicate that the differentiation between New York City and the rest of the state is based upon 'its size and complexity, resulting in special requirements for transportation to use available services.' It is difficult to

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creational] purposes, defendant erroneously assumes that welfare recipients in the suburban counties live in more pleasant and less frustrating surroundings than those in New York City. The picture of suburban welfare recipients living in garden apartments (the term used on oral argument), located on the edge of a park, is an unreal one. It ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients." 303 F. Supp. 349 (A. 116). See "Poverty in Spread City: A Study of Constraints On the Poor in Nassau County," published by the Organization for Social and Technical Innovation, [Cambridge, Mass] and Llewelyn-Davies Weeks, Forester-Walker & Bor [N.Y., N.Y.] (August, 1969).

> understand how transportation costs could account for the differentiation in grant levels. Moreover, such differentiation does not appear to be supported by the most recent information (August 1968) from the Bureau of Labor Statistics on living costs within the state, e.g., such costs as Buffalo as compared to New York City."

We also have difficulty understanding. In view of appellant Wyman's abysmal failure to show any rational basis for the disparate allowances, the lower court's directive to apply an "objective," "cost of needs" rationale was proper.[32]

C. *The Erroneous Characterization by Appellants of the Equal Protection Analysis by the Court Below.*

In its discussion of the equal protection analysis by the court below, appellants' brief engages in an unhappy medley of erroneous characterization, misleading analogies and plain irrelevancy. Below we review these aspects of appellants' brief and compare them to what the court did conclude.

1. Appellants' Erroneous Characterization of the Equal Protection Standards Considered by the Court Below.

Appellants argue throughout their brief and jurisdictional statement that the decision of the court below rested upon application of "a more rigorous standard for statutes relating to welfare allowances." (p. 30, Appellants' Brief). However, the court below carefully stated the opposite. Said the court:

> ". . . we must conclude, on the basis of the record now before us, that the differential between allow-

[32]The order below, restraining appellant Wyman from promulgating schedules except on an "objective," "cost of needs basis," carefully avoided specifically mandating a level of benefits, higher or lower. Rather, the injunction required that whatever level is implemented be based on objective, relevant factors. Commissioner Wyman complied with this directive for use of objective levels by implementing grants in surrounding counties *equal* to those provided in New York City. This is hardly consistent with his attempt to rationalize *unequal* levels to this Court.

> ance levels established for welfare recipients in New York City and those in surrounding counties constitutes an arbitrary, invidious and irrational inequality in violation of the Equal Protection Clause, even when judged by the traditional, rather than the more stringent standard." 303 F. Supp. at 347 (A 112).

Appellants thus misconstrue the nature of the reasoning of the court below. The court below held that the differential herein violates both the "traditional" and the "more stringent standard". While the court below was willing to put aside the presumptions which ordinarily favor state legislative classifications, it did not find it necessary to do so. Even such presumptions fall when no rational grounds can be found to justify them. *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U.S. 150 (1896). And here, no rational basis could be found to justify the classifications.

It is true that, in addition to finding that the appellants' differential probably violated the "traditional" equal protection standard, the court below also concluded that "a more stringent standard" should be applied where "fundamental or critical personal rights" are adversely affected – especially where the differentials "operate to the detriment of a disadvantaged minority". 303 F. Supp at 346. This conclusion on the part of the court below appears invalid in light of this Court's subsequent opinion in *Dandridge v. Williams*, __U.S. __, (1970), 38 U.S.L.W. 4277. Our point, however, is that the conclusion of the court below with regard to the more stringent standard is superfluous to this case in light of the solid basis for the conclusion of the court below that the traditional standard is also violated by the invidious quality of appellants' differential. It is for the latter reason that the equal protection aspect of this appeal, aside from its preliminary nature, is entirely distinguishable from *Dandridge, supra*.

In *Dandridge, supra*, this Court determined that "solid foundation for the regulation [there at issue] can be found in the State's legitimate interest in incouraging employment and in avoiding discrimination between welfare families and

the familes of the working poor." 38 U.S.L.W. at 4281. But there is no such solid ground here. Here, there is no minimally rational ground.

It was precisely such minimum rationality for which the Court diligently searched in the record below. Appellants claim the Court "improperly reversed the presumption of validity of the state statute", (p. 23, Appellants Brief.) On the contrary, the Court examined each justification offered for a conceivable and reasonable basis for the differential. None appeared. Appellants claim that the "proof adduced by appellants that there was an higher actual cost of living to metropolitan residents not reflected in item-by-item specifications in the standard of need", was ignored by the court below. (p. 15, Appellants' Brief).[33] However, the opposite is true. The court below carefully and exhaustively examined every suggestion by appellants of any proof whatsoever. The Court found not "an iota of evidence" to support the differential. 303 F. Supp. at 349.

Appellants fail to grasp the qualitative distinction between their ability to *name* an alleged "justification" for the differential and their inability (as well as our inability and the district court's inability) to show a *rational basis* for the "justification". Thus appellants name, as a justification, the greater number of recipients in New York City. But there is no rational relationship between that fact and the reason why a Queens (New York City) recipient's standard of need should be higher than a Nassau County recipient's standard. Appellants alleged, as their primary justifi-

[33]This claim by appellants shifts throughout. Thus what is alleged as out-of-hand rejection of proof of actual higher costs in New York City (P. 15, Appellants' Brief) becomes rejection of "precise testimony" on legislative purpose (P. 30) and, in appellants' jurisdictional statement, it is rejection by the Court of "uncontroverted proof" as to higher costs in New York City related to the "need" for more frequent transportation. This may or may not have been a legislative purpose in creating the differentials. But there was not an "iota of proof" that such a greater need exists. Nor is there any rational ground to believe that it exists.

cation, a greater "social need" in New York City for transportation to such places as day care centers. But how could it be that mothers in the Bronx have a greater *need* for transportation to day care centers than mothers in Yonkers? Mothers need day care centers if they work. Mothers in the Bronx are no more or less prone to work than mothers in Yonkers. For appellants to simply *assert* the opposite—without any ground whatsoever to support such a conclusion—and then claim that such an assertion provides a rational basis for discriminating against the Westchester mother, and further claim that such assertion meets the requirements of the Equal Protection Clause, is to push the "traditional" standard very far indeed.[34] Especially when (as the record indicates) transportation costs more in the suburban counties than it does in New York City. We are not aware that the "traditional" standard requires the abandonment of all common sense or reasoning power. And the court below properly refused to find that it did.

And, of course, for all the reasons indicated earlier with regard to the statutory violations, appellants newly-thought-up "justifications", raised for the first time before this Court, are as lacking in sensible rationale for equal protection purposes as they are for statutory uniformity purposes.

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[34] *Cf. Turner v. Fouche*, ____ U.S. ____, 38 U.S.L.W. 4090 (January 19, 1970). In *Turner* the Court invalidated under traditional equal protection standards, id. at 4094, a Georgia statute which limited membership on county boards of education to persons owning real property. The argument that the lack of ownership of realty demonstrated a lack of attachment to the community and its educational values was rejected as having no basis in fact. The Court noted, comparing *Leary v. United States*, 395 U.S. 6 (1929) and *Toi v. United States*, 319 U.S. 463 (1943), that

> "However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold." 38 U.S.L.W. at 4094.

Moreover, they surely should be initially raised before the district court—as earlier herein discussed—rather than before this Court, especially in light of the preliminary nature of the injunction here appealed.

2. Appellants' Misleading Analogies.

For reasons which escape us, appellants suggest (p. 38-39, Appellants' Brief) that appellees would require every state to pay the same welfare benefits to each recipient. Of course, appellees make no such argument. We contend, simply that the Fourteenth Amendment requires that some rational basis exist for significantly different treatment of welfare recipients who receive grants under the same state welfare program and who are identically situated except for the town they live in.

In addition, appellants rely heavily on *Jefferson v. Hackney*, 304 F. Supp. 1332 (N.D. Tex., 1969), for the proposition that the state may pay different amounts of benefit to different welfare recipients in the same need. However, the district court in *Jefferson* was strongly and explicitly influenced in its equal protection reasoning by the fact that plaintiffs therein sought to compare differing benefit levels in *different welfare programs* (AFDC and OAA), (which programs were believed by the *Jefferson* court to have different purposes). The discriminations herein are between recipients in the same programs. The basis for concluding which recipient gets the higher benefits is solely the town in which he resides. Compare *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Appellants cite a series of cases which permit separate legislation in the City of New York (pp. 23 and 39, Appellants' Brief). These cases, however, were based on a finding of rational factors, such as the different natures of housing in New York City, leading to a special Multiple Dwelling Law, or on a valid countervailing state purpose, as with a property use tax. No such finding was possible here. In-

deed, the welfare programs involved here are statewise on their face, are required to be statewide by federal law (See Section B, *supra*) and have the same purposes in New York City and elsewhere in the state: meeting the basic needs of recipients. In meeting the basic needs of indigent families, the question to be asked is simply, is there any fair reason to provide persons in Nassau and Weschester counties, for for example, with less assistance than persons in New York City? The answer, as it emerged from the proof adduced below is clearly, no.

Finally, appellants argue (p. 41, Appellants' Brief) that: "In any event, as we have shown, the differential here was prompted by humane motives." The claim for "humane motive" is odd, indeed, when we recall that §131-a resulted in a drastic cutting of benefit levels of these appellees and those in New York City as well. While standards for New York City recipients were cut less drastically than for these appellees, that hardly establishes "humane motives" as the cause for the differential. Rather, appellants virtually admit the real motive has nothing to do with humane feelings. Appellants tell us that the statutory direction to cut suburban levels below New York City levels, and allowing local officials to apply for increase, "demonstrates the State Legislature's concern for the ability to pay off the various welfare districts since they would be required to pay one-quarter of any increase over the established levels." Saving money, and conceding to local Treasury interests, was the obvious and invalid motive: *Cf. Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

D. *The Limited Nature of the Preliminary Injunction*

The limited nature of the interlocutory decision here at issue itself demonstrates the careful and wise use of discretion by the Court below. As first stated in its opinion, 303 F. Supp. at 351[35] (A 120):

[35] The critical language in the order, "other than according to objective, non-discriminatory standards based upon the cost of the needs of such recipients", is identical. See (A 125).

> "Accordingly, plaintiffs' motion for preliminary relief granted to the extent that pending trial and final determination of the action defendants will be restrained from further enforcement or implementation of 131-a of the New York Social Services Law, or from promulgating schedules of grants and allowances of public assistance, or making payments to recipients, *other than according to objective, nondiscriminatory standards based upon the cost of the needs of such recipients.* Trial of the action will commence on October 6, 1969 at 10:00 A.M. Defendants' motion for summary judgment is denied." (Emphasis supplied).

The preliminary injunction at issue to be sure, does prohibit the appellants from paying smaller grants to welfare recipients in Nassau or Yonkers upon the speculation that welfare recipients who live in Queens or the Bronx have a greater subjective need to travel more frequently to museums or clinics. But as can readily be seen, it does not specify the raising of levels of allowances or dictate what the particular schedules for persons in New York City or the suburban counties shall be. It merely requires that the grants paid be based upon standards arrived at by consideration of objective costs of similar items of need.

The preliminary order, it should be noted, was signed September 12, 1969. The trial was set for October 6, 1969. Before trial—and certainly during trial—appellants were free to present to the court any evidence whatsoever that costs of any of the items included in the schedules of allowances were in fact higher in New York City than in Nassau, Westchester or the other suburban counties. Indeed, the court's preliminary order is so phrased as to make it possible for appellants to pay differential allowances based upon objective studies demonstrating differences in costs of items included within the schedule of allowances without requesting permission of the court below. Such differentials would be consistent with the statutory requirement of uniformity.

Yet the appellants sought to present no such evidence to the court below. Nor have the appellants sought to implement an objective study which itself would justify a differential in payment. Nor did the appellants seek a final determination upon the trial (in which they might present evidence of their claims that welfare people in Queens and the Bronx have "higher social aspirations" than people who live in Nassau and Yonkers). Instead they brought an appeal to this Court, challenging the district court's discretion to issue its limited and carefully phrased injunction. Thereafter as we discussed earlier in this point, appellants raised before this Court for the first time certain apparently frivolous afterthoughts as to different needs in New York City.

We submit that the limited nature of the preliminary injunctions, the ready availability of a trial forum through which appellants and appellees could have reached a final adjudication of their contentions and in which appellants could have presented evidence of their new post-preliminary injunction claims, are all factors indicating the proper use of discretion to the court below. The trial, as a forum in which any new claims by appellants can be fully heard and examined, is still available and awaiting appellants.

POINT II

The Doctrines of Exhaustion, Ripeness, and Abstention Have no Applicability in the Circumstances of This Case; the District Court Was Correct in Proceeding To Determine This Claim.

It is by now established beyond peradventure that an individual pressing a claim under 42 U.S.C. § 1983 is not required to exhaust state remedies before proceeding with an action in federal district court. *King v. Smith*, 392 U.S. 309 (1968); *Damico v. California*, 389 U.S. 410 (1967); *McNeese v. Board of Education*, 373 U.S. 668 (1963). "The federal remedy [§ 1983] is supplementary to the state remedy, and the latter need not be first sought and refused

before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961), for it "would defeat [the] purposes" of § 1983 to hold "that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." *McNeese, supra*, 373 U.S. at 672.

Perhaps recognizing the futility of arguing the exhaustion question directly, appellants have attempted to disguise what is inevitably a contention that exhaustion should be required by speaking of ripeness and abstention. Neither of these doctrines, however, is applicable on the facts of this case.

Appellants argue that federal adjudication of the plaintiff-appellees' claim was "unripe" because "§ 131-a itself contains a plenary remedy" the use of which might conceivably eliminate the challenged payment differential. Appellants' Brief, p. 17. The remedy suggested consists of proceeding under Article 78 of the Civil Practice Law and Rules in the nature of mandamus either to compel a social services district to apply to appellant Wyman under § 131-a(4) for an increase in its level of payments or to compel appellant Wyman to render a decision on an application already made. Appellants' Brief, pp. 17-18.[36] In this connection appellants rely on the district court opinion in *Rosado v. Wyman*, 304 F. Supp. 1354 (E.D.N.Y. 1969), in which the

[36] §131-a(4) provides: "4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision."

payment differential between New York City and its surrounding counties was initially challenged. After that case was brought, subsection (4) was added to § 131-a by the New York State Legislature, in light of that development, although it considered itself to have been properly convened, 304 F. Supp. at 1355, the three-judge court dissolved itself on the ground that:

> "any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding." 304 F. Supp. at 1356.

Appellants' reliance on *Rosado* is entirely misplaced. The *Rosado* court did not hold that the challenge to the differential was "unripe" because plaintiffs had failed to pursue a questionable state remedy. Rather it found that federal consideration of the disparity should be postponed until appellant Wyman had promulgated or had a chance to promulgate new payment schedules. In short, appellant Wyman was given an opportunity to eradicate the challenged disparity. When appellant Wyman in fact did act, by promulgating on June 5, 1969, a statewide schedule of allowances with immediate impact that failed to eliminate the differential between New York City and the surrounding counties, any reason for considering the issue unripe for adjudication disappeared. Appellants' reliance on *Schuman v. State of New York*, 270 F. Supp. 730 (S.D.N.Y. 1967), Appellants' Brief, p. 19, demonstrates the bankruptcy of their ripeness contention. In that case the district court held that until a prosecution under a state statute was actually initiated, a federal challenge of that statute was unripe. Had the state authorities acted there, as appellant Wyman acted here when he promulgated statewide payment schedules, the issue would have been actual and ripe, not hypothetical. The purpose of the ripeness requirement in this context is to give a state official a chance to correct or avoid, of his own accord, a conflict with federal law. When official action is taken with direct impact on individuals, no longer is the matter "unripe."

Appellants mistakenly assert that the validity of the disparate grants is not a "ripe" issue until literally endless efforts have been made to persuade appellant Wyman to equalize grant levels. Appellants' Brief, pp. 19-20. Ripeness does not depend upon immutability of the regulation but rather upon whether the regulation is likely to affect, or in fact has affected, the claimants before the federal court.[37] Thus the district court in this case properly found that

> "The situation has changed substantially since the three-judge court in *Rosado v. Wyman* dissolved itself on the ground that the issue now before this Court might be rendered moot by administrative action. Administrative action now has been taken and it has failed to moot the issue." 303 F. Supp. at 350.[38]

Requiring, as appellants would, that welfare recipients press their challenge to the discriminatory payment schedules in the state courts in the hope that adjudication by the federal courts would become unnecessary amounts to requiring them to exhaust state judicial remedies. As noted above, this Court has unqualifiedly rejected the proposition

[37] Appellants erroneously state that the district court invalidated 91.31-a. What the court actually did was invalidate "the differential between allowance levels established for welfare recipients in New York City and those in surrounding counties." 303 F. Supp. at 347. That differential was embodied in a state-wide regulation, 18 NYCRR § 352.4, promulgated by appellants.

[38] It is interesting to note that Judge Hays, who concurred in the opinion below, wrote the opinion of the Second Circuit on the ripeness issue in *Rosado*, in which he found that the three-judge court "was right in refusing to act on facts that were fluid and subject to early change." 414 F. 2d at 175. His concurrence in Judge Mansfield's opinion is consistent with his view that the issue before the three-judge court in *Rosado* was "premature." *Id.*

that state remedies must be exhausted in suits brought under 42 U.S.C. § 1983.[39]

Appellants also invoke the doctrine of abstention, arguing that "the District Court effectively denied the state courts any opportunity to interpret this new statute." Appellants' Brief, p. 20. However, since the meaning and applicability of the challenged regulation is entirely clear, the doctrine of abstention is entirely inapposite to this case. It is only where a state court interpretation of a statute of uncertain meaning or vague applicability might render federal adjudication of the federal claims unnecessary that abstention comes into play. See, *e.g.*, *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harrison v. NAACP*, 360 U.S. 167 (1959). As this Court has noted, federal courts may abstain where

> "the unsettled issue of state law principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, where

[39] "Indeed, there may be no state judicial remedy that is available to individual welfare recipients. Contrary to appellants' assertion, Appellants' Brief, p. 21, there are no remedial provisions or private remedies contained in § 131-a(4). While the three-judge court opinion in *Rosado* implies the contrary, such remedies are at best speculative. Cf. *Holmes v. New York City Housing Authority*, 398 F. 2d 262, 267 (2d Cir. 1968). Section 131-a(4) merely empowers appellant Wyman to implement new schedules either unilaterally or upon the request of local social services districts. In fact, appellants ask that appellees bring a proceeding to compel a decision on Nassau County's pending application to appellant Wyman and/or to compel another social services district to apply to appellant Wyman; in either case, appellees have no direct remedy against the Commissioner. Moreover, § 131-a(4) appears to require the exercise of *discretion* by the Commissioner; it is arguable that an Article 78 proceeding may not be brought to compel an administrator to perform other than an administrative duty. See CPLR § 7803(1). Litigants may not be required to pursue remedies that are in fact unavailable to them. 1 Jaffe, Judicial Control of Administrative Action 424 (1965). Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Rosado v. Wyman*, U.S. , 42 U.S.L.W. 4266, 4268 (1970).

> resolution in a particular manner would eliminate the constitutional issue and terminate the litigation." *Baggett v. Bullitt*, 377 U.S. 360, 376-77 (1963).

The state regulation at issue here, 18 NCYRR §352.4, imposes schedules of disparate allowances that are not subject to interpretation or construction that could remedy the uneven treatment. The clear written provision of, for example, $191 per month for one family of four as against $208 for another family of four, is clear on its face. No court interpretation of these schedules could eliminate the differential challenged. *Baggett v. Bullitt, supra. Cf Harrison v. NAACP, supra.*[40] Hence, resort to state courts would be futile where the Regulation's defect cannot be corrected by "interpretation." The dollar levels, the specific persons affected, the prohibition on exceeding the maximums set are disclosed on the face of the statute and regulation, the district court need not have abstained to a state court where no conceivable interpretation could have eliminated the defect challenged.[41] It is this obvious that appellants are once again asking only that the state courts be given an op-

[40] Heavily relied upon in appellants' brief at p. 20, 21, this case required abstention where the plaintiffs attacked five Virginia statutes which were indefinite in their impact and meaning, and which the court specifically said "might well be read as valid" and "not even apply[ing]" to these appellees. 360 U.S. 177. No such interpretation, or one that would make the differential vanish or the allowances not apply to the appellees, is even suggested by the state herein.

[41] As noted by Justice Douglas in his concurring opinion in *Reetz v. Bozanich, supra*, "the state courts . . . are no more competent to decide the federal question than are the federal courts. The terms of the New York statute [N.Y. §131(a)(4)] are clear, and there is no way in which a state court could interpret the challenged law in a way which would avoid the statutory claim pressed here." 38 U.S.L.W. at 4274. The very same New York statute is at issue here, and while the federal claims are different from the claim discussed by the Supreme Court in *Reetz*, the New York statute is no more susceptible here than in *Reetz* of a state court interpretation that would avoid the federal claims.

portunity to moot appellees' federal claims, which amounts to asking appellees to fulfill the discredited requirement of exhaustion of state remedies before pursuing their federal claims in the federal courts.

CONCLUSION

For all of the above reasons, the orders of the lower court providing preliminary injunctive relief *pendente lite* should be affirmed.

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